

161—8.7(216) Remedial and affirmative action.

8.7(1) *Policy statement.* Employers and other persons subject to the Act, Iowa Code chapter 216, are required to maintain nondiscriminatory employment and personnel systems and therefore are obligated to comply with the statute without awaiting the action of any governmental agency. Thus, employers and other persons subject to the Act who, after a self-analysis, have concluded that there is a likelihood that they may be found in violation of the Act because of some aspect of their employment and personnel system, are required by the statute to take remedial and affirmative action to correct the situation. An employer or other person subject to the Act who has a reasonable basis for concluding that it might be held in violation of the Act and who takes remedial and affirmative action reasonably calculated to avoid that result on the basis of self-analysis does not, in the opinion of the commission, thereby violate the Act with respect to any employee or applicant for employment who is denied an employment opportunity as a result of action. In the opinion of the commission, the lawfulness of remedial and affirmative action programs is not dependent upon an admission, or a finding, or evidence sufficient to prove that the employer or other person subject to the Act taking the action has violated the Act.

8.7(2) *Type of affirmative action covered.* In the opinion of the commission, an employer or other person subject to Executive Order Number 15 who has adopted an affirmative action program pursuant to and in conformity with Executive Order and federal and state regulations does not violate the Act by reason of its adherence to its affirmative action program. Furthermore, for purposes of demonstrating to the commission that an employer or other person has reasonably concluded that it might be held in violation of the Act and that the remedial and affirmative action it has taken is reasonably calculated to avoid that result, the employer or other person may rely on an analysis which has been conducted in order to comply with Revised Order 4 or related orders issued by the Office of Federal Contract Compliance Programs under Executive Order 11246, as amended, or similar analysis required under federal, state, and local laws prohibiting employment discrimination.

8.7(3) *Use of goals and numerical remedies.* The remedial and affirmative action programs contemplated by commission rules, whether taken by private employers or governmental employers or other persons covered by the Act, include the use of race, color, creed, sex, age, religion, disability, and ethnic-conscious goals and timetables, ratios, or other numerical remedies intended to remedy the prior discrimination against, or exclusion of, protected classes or to ensure that the employer's practices presently operate in a nondiscriminatory manner. Employers or other persons subject to the Act must be attentive to the effect of their employment practices in light of past discrimination by others. *Griggs v. Duke Power*, 401 U.S. 424(1971). Numerical remedies must be reasonable under the facts and circumstances which include any discrimination to be remedied and the relevant work force. Benefits under remedial and affirmative action programs need not be restricted to identifiable victims of past discrimination by the employer or other persons subject to the Act. Specific remedial and affirmative measures may include, but are not limited to, those described in the Equal Employment Opportunity Coordinating Council's "Policy Statement on Affirmative Action Programs for State and Local Government Agencies." (41 Federal Register 38814, September 13, 1976), which reads, in relevant part:

"2. Voluntary affirmative action to assure equal employment opportunity is appropriate at any stage of the employment process. The first step in the construction of any affirmative action plan should be an analysis of the employer's work force to determine whether percentages of sex, race, or ethnic groups in individual job classifications are substantially similar to the percentages of those groups available in the work force in the relevant job market who possess the basic job related qualifications.

"When substantial disparities are found through such analysis, each element of the overall selection process should be examined to determine which elements operate to exclude persons on the basis of sex, race, or ethnic group. Such elements include, but are not limited to, recruitment, testing, ranking, certification, interview, recommendations for selection, hiring, promotion, etc. The examination of each element of the selection process should at a minimum include a determination of its validity in predicting job performance.

"3. When an employer has reason to believe that its selection procedures have the exclusionary effect described in paragraph 2 above, it should initiate affirmative steps to remedy the situation. Such

steps, which in design and execution may be race, color, sex or ethnic 'conscious,' include, but are not limited to, the following:

"The establishment of a long term goal and short range, interim goals and timetables for the specific job classifications, all of which should take into account the availability of basically qualified persons in the relevant job market;

"A recruitment program designed to attract qualified members of the group in question;

"A systematic effort to organize work and redesign jobs in ways that provide opportunities for persons lacking 'journey person' level knowledge or skills to enter and, with appropriate training, to progress in a career field;

"Revamping selection instruments or procedures which have not yet been validated in order to reduce or eliminate exclusionary effects on particular groups in particular job classifications;

"The initiation of measures designed to assure that members of the affected group who are qualified to perform the job are included within the pool of persons from which the selecting official makes the selection;

"A systematic effort to provide career advancement training, both classroom and on-the-job, to employees locked into dead end jobs; and

"The establishment of a system for regularly monitoring the effectiveness of the particular affirmative action program, and procedures for making timely adjustments in this program where effectiveness is not demonstrated."

8.7(4) *Written opinions.* If during the investigation of a charge an employer or other person asserts that the action complained of was taken pursuant to a program such as those described in these rules, the investigating official shall determine whether the program conformed to the requirements stated in these rules for a program. If the investigating official so finds, the investigating official will set forth the facts on which the findings are based and will issue a "no probable cause" finding on the complaint. If the employer or other person also asserts that the action complained of was taken in good faith, in conformity with and in reliance upon commission rules, the investigating official shall determine whether the assertion is true. If the investigating official so finds, the investigating official will set forth the facts on which this finding is based and include the finding with the other findings described in this section in the "no probable cause" finding.

8.7(5) *Reliance.* The commission shall apply the foregoing principles where the challenged person's action is taken pursuant to any attempt to comply with the antidiscrimination requirements of any federal, state, or local government laws.

8.7(6) *Limitations of standards.* The specifications of remedial and affirmative action in commission rules is intended only to identify certain types of actions which an employer or other person may take consistent with the Act but does not attempt to provide standards for determining whether voluntary attempts to eliminate discrimination against minorities and women have been successful. Whether, in any given case, the employer who takes remedial and affirmative action will have done enough to remedy discrimination against those protected by the Act will be a question of fact in each case.